

Chapter 2

JUDICIAL ENFORCEMENT OF THE CONSTITUTION AND MODELS OF CONSTITUTIONAL ADJUDICATION

A written constitution,^a which creates legal rights and obligations, is bound to raise questions of interpretation and enforcement much like any ordinary law. Moreover, as constitutional provisions are often more general and open-ended than typical statutory provisions, arguably they allow far greater interpretive latitude than do their statutory counterparts. Indeed, as the readings in the relevant chapters below clearly demonstrate, generally stated constitutional rights to privacy and equality and freedoms of speech and religion are open to multiple and often contradictory interpretations. This raises the following basic questions: Who is (or ought to be) the authoritative interpreter of the constitution? And what are the proper canons and limits of constitutional interpretation?

These questions are particularly crucial in the context of constitutions that are difficult to amend. As noted in the discussion on constitutional amendments in Chapter 1, innovative and far-reaching constitutional interpretations by courts may well have the same consequences as a formal amendment. Unlike in the case of statutory interpretation, where a parliament may deal with judicial interpretations it disagrees with through further legislation, a parliament with no control over the adoption of constitutional amendments seems largely helpless in the face of constitutional adjudications with which it disagrees.

Given these dangers, is it wise to entrust enforcement of the constitution to courts? Or is it best to apportion that task among various different powers? Or should courts be deprived of the power of having the last word? Section A deals with these issues and focuses on whether a working constitutional order can be maintained without constitutional adjudication; whether, where courts have a role in constitutional enforcement and adjudication, they should be given sole or ultimate authority; and whether the legitimacy of constitutional adjudication depends on granting finality to such adjudication. Section B reviews the principal models of constitutional adjudication and concentrates on the contrast between centralized and decentralized constitutional review and on whether centralized review by specialized bodies is genuinely judicial in nature. Next, the section deals with issues concerning the independence of

a. Unwritten constitutions are also bound to require interpretation but may raise certain issues of their own. See *United Mizrahi Bank, Ltd. v. Migdal Village*, *below*.

the constitutional adjudicator, by focusing on methods and criteria of appointment, composition of the relevant court, and its relation to the other branches of government. Section B asks several questions: Who can trigger the process of constitutional adjudication?; What is properly subject to constitutional adjudication?; and Who is bound by it and to what extent? Section C, the final section, is devoted to salient issues relating to theories and practices of constitutional interpretation in various constitutional systems.

A. THE PLACE OF CONSTITUTIONAL ADJUDICATION IN A WORKING CONSTITUTIONAL ORDER

Disputes concerning ordinary legal rights and obligations are customarily resolved by courts. Similarly, to the extent that constitutions grant legally enforceable rights and impose legally binding obligations, it seems logical to submit constitutional disputes to judicial resolution. Most countries with written constitutions provide for constitutional adjudication by courts or court-like institutions; but some have not. One such constitutional democracy is The Netherlands.

Even in countries in which courts can adjudicate cases involving constitutional issues, questions may arise concerning whether such courts may invalidate ordinary laws conflicting with the constitution but enacted after the constitution's adoption; whether constitutional interpretations rendered in the course of adjudications are authoritative and binding on other branches of the government, such as the legislative or executive branch; and whether courts ought to have the final word when it comes to interpreting the constitution.

The United States Constitution does not designate an authoritative interpreter of the Constitution. It also does not specify whether courts can invalidate ordinary federal laws that are in conflict with the Constitution. Article III Sec. 2 of the Constitution does provide, however, that "The judicial Power shall extend to all Cases * * * arising under this Constitution * * *." The U.S. Supreme Court (USSC) addressed these crucial questions, left open by the Constitution, in the following landmark decision.

MARBURY V. MADISON

Supreme Court (United States)

5 U.S. 137 (1803)

[William Marbury was nominated to be a federal judge by President John Adams and confirmed by the U.S. Senate on the very last day of the Adams administration. In order to assume his duties as a judge, Marbury had to receive his commission, which was to be delivered by the Secretary of State. The incoming President, Thomas Jefferson, refused to have Marbury and other "midnight judges" (so called because they were appointed at the very last moment of the preceding administration) to serve, and so instructed his Secretary of State, James Madison, not to deliver the requisite commissions. Marbury sued to request that the Court instruct Madison to deliver the commission. In adjudicating the dispute, the Supreme Court had to decide how to

deal with a contradiction between the Judiciary Act of 1789, adopted by the U.S. Congress, and Article III of the 1787 Constitution.]

The opinion of the Court was delivered by CHIEF JUSTICE MARSHALL:

* * *

The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion: nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative acts repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is; consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject. If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law * * *

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey? There are many other parts of the constitution, which serve to illustrate this subject. It declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law? * * *

From [this], and many other selections, which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! * * *

It is also not entirely unworthy of observation that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and

not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

If the legitimacy of constitutional adjudication can be vexing in certain countries with written constitutions, like the U.S., it seems fraught with greater difficulties in countries with no written constitution. Indeed, in the absence of a text it may prove difficult to distinguish between constitutional and infraconstitutional legal norms or to account for constitutional changes, let alone to determine whether courts can invalidate laws on ill-defined or fragile and changing constitutional grounds. Nevertheless, in a landmark decision excerpted below, the Supreme Court of Israel confronts the issue of constitutional review in a broad-based decision that not only addresses the issue of judicial invalidation of laws contrary to the Constitution but also involves the Court in shaping the constitutional order in a way that seems to blur the boundary between making a constitution and interpreting and applying it.

UNITED MIZRAHI BANK LTD. V. MIGDAL VILLAGE

Supreme Court (Israel)
C.A. 6821/93, 49(4)P.D.221 (1995)

[In this case, the Court decided not only whether it had the authority to interpret the country's Basic Laws and to invalidate legislation it found incompatible with a Basic Law, but also whether the Basic Laws had constitutional status. This latter question was quite important because, if answered in the affirmative, it would follow that any ordinary legislation incompatible with Israel's Basic Laws could be struck down as unconstitutional].

[Upon creation of the State of Israel, in 1948, the country's Parliament, the Knesset, was constituted as both a constituent assembly and as a legislature. The Knesset failed to adopt a constitution, but in later years enacted various Basic Laws, which can be repealed only by absolute majority (as distinct from ordinary legislation, which can be repealed by a majority of those present, provided there is a quorum). The two Basic Law chapters at stake in this case, on "Freedom of Occupation" and "Human Dignity and Freedom," respectively, were enacted in 1994. The issue raised in the case was whether legislation affecting property in the "familial agricultural sector" violated rights to property enshrined in these Basic Laws.]

CHIEF JUSTICE A. BARAK:

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I. The Source of the Knesset's Authority to Enact a Constitution for Israel

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V. Judicial Precedent of the Supreme Court

35. The Supreme Court recognized the power of the Knesset to entrench

the provisions of a Basic Law against regular legislation, as set forth in four decisions rendered before the March 1992 enactment of the Basic Laws as to human rights * * *

In the *Tenuat Le Or* case I noted as follows:

A law of the Knesset—whether a ‘regular’ law or a basic law—that seeks to change an ‘entrenched’ provision without having been adopted by the necessary majority contradicts the entrenchment provision of the Basic Law. In light of its legal effect the ‘entrenchment’ provision takes precedence. In this clash between the entrenchment provision and the provision that seeks to change it without meeting the necessary majority requirement we do not apply the standard rules of construction, according to which a later enacted law invalidates an earlier enacted law. In this clash we apply the principle that gives normative precedence to the entrenched Basic Law. (H.C.J. 142/89 *supra* at p. 539).

Thus the Court has recognized the Knesset’s power to “entrench” the Basic Laws against change or infringement * * * This primacy is certainly consistent * * * with the constituent authority of the Knesset, empowered to enact a constitution for the State. In * * * the *Tenuat Le Or* case, I discussed the Knesset’s status as a constituent authority, noting as follows:

This ‘entrenchment’ applies in our system, for we recognize the Knesset’s power to function as a constituent authority and to prepare Basic Laws that will constitute the various chapters of the State constitution. (p. 539).

36. Since the enactment of Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty, the question of the normative status of these Basic Laws has arisen incidentally in the decisions of the Supreme Court. The Supreme Court has taken the position that these two Basic Laws enjoy constitutional supral legislative status. Justice D. Levin concluded that this was so in the first decision to deal with the constitutionality of Basic Law: Freedom of Occupation. Justice Levin wrote:

When these two Basic Laws came into being they erected, by their own force and in conjunction with various basic rights that had been scattered here and there throughout our caselaw, the foundations and walls of the Israeli constitutional edifice. This construction has not, however, been completed, and there remains more to be drafted and enacted so that the constitution may stand in its full glory, radiating its light on the institutions of government and law in Israel. Nonetheless, the work that has been done is the construction of a stable constitutional structure, protected by the mantle of the principle and values anchored in the Declaration of Independence. * * *

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V. The Knesset as Exercising Constituent Authority Conclusions

38. The social-historical journey has concluded. This journey is necessary. Constitutionality and the constitution are not mere formal documents. They are not mere law. They are the fruit of the national experience. They are society and culture. Indeed the constitution is the reflection of the national experience. The words of Justice Agranat still resonate:

For it is a well-known axiom that to study the law of a people one may look through the prism of its system of national life.

Our system of national life, our national experience, from the establishment of the State until today, is that the Knesset is seen in our national consciousness as the body authorized to enact a constitution for Israel. This consciousness originated before the establishment of the State and the preparation for the giving of the constitution. This consciousness was crystallized in the Declaration of Independence. It took on real form in the elections for the Constituent Assembly. It was consolidated in the social-legal understanding that the Knesset is endowed with constituent authority and is empowered to enact a constitution for Israel. The rhetoric of constituent authority and constituent power was particularly strong during the first years after establishment of the State. This rhetoric weakened with the passage of time. That is natural. Nonetheless, the basic understanding that the Knesset is endowed not only with regular legislative authority but also with constituent authority accompanied the Knesset from its inception * * * The renewed rhetorical reference to the Knesset as endowed with constituent authority in the context of the enactment of Basic Law: Freedom of Occupation in 1994 shows this as well. Indeed, the view that the Knesset is authorized to enact a constitution is deeply embedded in the social and legal consciousness of the Israeli community. This is part of our political culture. On the basis of this view, we, the judges of Israel are entitled to declare today that according to the rule of recognition of the State of Israel the Knesset is endowed with legislative and constituent authority and that the Knesset may, in exercising its constituent authority, limit the exercise of legislative authority. In truth, the rule of recognition at the outset of the Second Knesset might have been different had the Supreme Court determined that constitutional continuity was cut off. But this did not happen. In my opinion this would not have happened even had the question arisen before the Court at that time. In any event, today's social-legal reality enables the Supreme Court—in whose hands rests consolidation of the rule of recognition—(see H.L.A., Hart, *The Concept of Law* 147–154 (2nd ed. (1994))) to identify and declare that our Knesset is endowed with both constituent and legislative authority: that it wears two “hats,” that in enacting the constitution it may limit its regular legislative power, that its constituent actions stand above its legislative actions. Of course while the Knesset's lawmaking power (its “legislative hat”) is continuous and everlasting, its power to enact a constitution (its “constituent hat”) is temporary and will terminate when the Knesset, as a constituent authority, determines that the constitutional undertaking has been completed. The constitution itself will set forth the means by which it may be revised and corrected. This conclusion—the fruit of the recognition—is also the best explanation for our social-legal history from the establishment of the State until today.

39. * * * [T]he constituent authority of the Knesset is always in the hands of the people. Indeed a constitution is not the act of a Government which endows its people with a constitution. The constitution is the act of people, which creates the government. It is the people that determines—according to its social viewpoint during the course of its history—in whose hands rests the highest authority of the State, and what is its rule of recognition. The Court gives expression to this social determination. The Court is the faithful interpreter of the people's will as expressed in the constitution. The Court attempts to give

the best possible interpretation for the entire national experience. The existence of a constitution is not a logical matter but a social phenomenon. The Court interprets the "social facts" and concludes from them as to the constituent power of the Knesset. This interpretation is not the result of intellectual construction. It is the expression of the social reality. * * *

[I]t is well accepted for courts to test the constitutionality of amendments. More than one such amendment has been invalidated as unconstitutional, and this has been not only for "formal" reasons (such a failure to meet majority requirements) but for substantive reasons as well (see the opinion of the Supreme Court of India in the case of *Kesavananda v. State of Kerala*, A.I.R. 1973 S.C. 146 [see Chapter 10]). Consider, in this regard, the following words of the Constitutional Court of Germany:

Laws are not constitutional merely because they have been passed, in conformity with procedural provisions * * * They must be substantively compatible with the highest values of a free and democratic order, i.e., the constitutional order of values, and must also conform to unwritten fundamental constitutional principles as well as the fundamental decisions of the Basic Law. (6 BVerfGE 32 (1957)).

* * *

[W]hen a judge must ask himself—while taking into account the entire picture—what is the look of today's Israeli community, against the background of the multi-faceted constitutional enterprise undertaken since the establishment of the State, and in light of the two latest Basic Laws and the reactions to them, my answer is that the Israeli Knesset is endowed with constituent authority. Indeed the judge's task is to give our legal and social history the explanation that best accords with the legal and social data.

III. Judicial Review of Constitutionality

A. Constitutional Supremacy and Judicial Review

The constitution is the supreme norm of the legal system. A regular law may be permitted to conflict with the provisions of the constitution only if it meets the criteria provided in the constitution itself. What is the fate of a law that does not meet these criteria? What is the remedy for unconstitutional law? The answer to these questions depends first and foremost upon the provisions of the constitution itself. Often the constitution sets forth—and is empowered to set forth—the legal sanctions imposed upon an unconstitutional law. Thus, for example, the "Supremacy Clause" of the Canadian Charter of Rights and Freedoms (Section (1)52) invalidates conflicting legislation that does not meet the requirements of the Constitution as follows:

"The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is to the extent of the inconsistency, of no force or effect."

Similar provisions are found in many modern constitutions, particularly those of European countries after the First World War. Such provisions proliferated in the constitutions of European countries after the Second World War and the victory over the Nazis. One of the lessons of the Second World War was that constitutional supremacy and judicial review of constitutionality are potent weapons against the enemies of democracy. But what is the rule when

the constitution is silent in this matter? The answer to this question depends upon the culture and tradition of the legal system. It is determined by the adjudication rule of the particular legal system. (See H.L.A. Hart, *The Concept of Law*, p. 96.) Thus, for example, it may be recognized—as was the tradition in nineteenth century Europe—that the constitution binds the institutions of the government. However, noncompliance with a constitutional directive does not lead to invalidation of the law, and the court is not empowered to impose the sanction of voiding such legislation. According to this view, the obligation to ensure compliance with the constitution rests with the government institutions themselves, and if they violate this obligation, the sanctions are in the hands of the public on election day. But this is not the only view, nor is it the most widely held. Today this is the minority view. Indeed, a particular legal tradition and culture are likely to lead to the conclusion that constitutional science in this matter should be interpreted as calling for the invalidation of conflicting legislation and to the concomitant conclusion that the determination of whether such a conflict exists rests not with the legislature but with the court. Under this view, constitutional silence requires judicial review and authorizes the Court to declare unconstitutional legislation void. [This point is buttressed by a discussion of *Marbury v. Madison* above.]

D. Judicial Review of Constitutionality in Israel

77. * * * The two Basic Laws contain no “supremacy clause.” What is the law in this situation? It seems to me that our legal tradition requires us to conclude that the remedy for an unconstitutional law is its invalidation and that the courts have been endowed with the authority to declare it so. Just as a regulation that conflicts with a statute is void and may be declared as such by the court, so also should be the case when a regular law conflicts with a Basic Law; the law is void and the court is empowered to declare it so.

E. The Rationale for Judicial Review of Constitutionality

(1) Judicial Review and the Rule of Law

78. The doctrine of judicial review of constitutionality is based upon the “rule of law”, or, more correctly, the rule of the constitution * * * The central role of the court in a democratic society is “to protect the rule of law. This means, inter alia, that it must enforce the law in the institutions of the government and it must ensure that the government acts according to the law”. When a given legal system includes a constitution, the “rule of law” requires that the sovereignty of the constitution be protected. Thus the Knesset, in using its constituent authority endowed the State with Basic Laws. In the normative hierarchy the Basic Laws are paramount. In order to fulfill the Knesset’s directives, regular legislation that conflicts with a Basic Law must be invalidated * * *

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(3) Judicial Review and Democracy

80. But is judicial review democratic? Is it democratic that the court—whose judges, are not elected by the people and do not represent a social and political platform—be empowered to invalidate a law enacted by elected officials? The formal answer is simple. The court in its judicial review of the constitutionality of law gives effect to the constitution and the Basic Law. Hamilton addressed this point over two hundred years ago, (in *The Federalist* No. 78).

In a similar spirit Rawls stated the following:

"A supreme court fits into this idea of dualist constitutional democracy as one of the institutional devices to protect the higher law. By applying public reason the court is to prevent that law from being eroded by the legislation of transient majorities, or more likely, by organized and well-situated narrow interests skilled at getting their way. If the court assumes this role and effectively carries it out, it is incorrect to say that it is straightforwardly antidemocratic. It is indeed antimajoritarian with respect to ordinary law, for a court with judicial review can hold such law unconstitutional. Nevertheless, the higher authority of the people supports that. The court is not antimajoritarian with respect to higher law when its decisions reasonably accord with the constitution itself and with its amendments and politically mandated interpretations." (John Rawls, *Political Liberalism*, 233 (1993)).

However, the formal answer alone is not sufficient.

In fact when the majority strips the minority of its human rights, democracy is impaired. (See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980)). Judicial review of constitutionality therefore prevails over what is known as the "counter-majoritarian dilemma." One way to accomplish this is by emphasizing that when judges interpret the constitution and invalidate contradictory laws they give expression to the fundamental values of society that have developed over time. Thus the court safeguards constitutional democracy and maintains the delicate balance upon which it is based. Remove majority rule from constitutional democracy and its essence is harmed. Remove the sovereignty of fundamental values from constitutional democracy and its existence is called into question. Judicial review of constitutionality enables the society to be true to itself and to honor its basic conceptions. This is the basis for the substantive legitimacy of judicial review. This is also the true basis for the principle of constitutionality itself. We are bound by the constitution that was enacted in the past because it expresses the fundamental outlook of modern society. It may therefore be said that each generation enacts the constitution anew. By means of judicial review we are loyal to the fundamental values that we took upon ourselves in the past, that reflect our essence in the present and that will direct our national development as a society in the future. It is therefore no wonder that judicial review is now developing. The majority of enlightened democratic states have judicial review. It is difficult to imagine the United States, Canada, Germany, Japan, Spain, Italy, and many other nations without judicial review of constitutionality. The Twentieth Century is the century of judicial review.

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(4) Judicial Review and Judicial Objectivity

81. Judicial review expresses the values of the constitution. By means of judicial review the judge makes manifest the ideals of the society in which he lives. He expresses the fundamental conceptions of society as it moves through the shifting sands of history. The judge in particular—who does not face election—and therefore benefits from judicial independence, is worthy of this task. It is because the judge is not elected by the people and does not present before them a social and political platform that he is qualified to express

the deepest perceptions of society without being influenced by the needs of the moment. For this purpose he must operate with judicial objectivity. He must express the outlook of society even if it is not his personal outlook. * * *

Declaring a law unconstitutional is a serious matter. Such a declaration would seem to undermine the will of today's majority. It may be justified by the supremacy of the constitution and its values. The justification applies when the judiciary, gives expression to the values of society as they are understood by the culture and tradition of the people as they move forward through history. This justification does not, however operate when the judge expresses his subjective beliefs. Indeed judicial objectivity is part and parcel of the basis of judicial review of constitutionality. In granting weight to different considerations the judge aspires to the best of his ability to achieve judicial objectivity. He reflects neither his personal values nor his personal considerations. The judge reflects "the values of the State of Israel as a Jewish democratic state." (*Eisenberg v. Housing Ministry*, 47(2) P.D. 229 (1993)). Indeed, this most difficult task can be achieved only by the professional judge, who has absorbed through years of experience the need to guarantee judicial objectivity, and benefits from total independence.

Notes and Questions

1. Contrast the respective approaches of Chief Justice Marshall in *Marbury* and Chief Justice Barak in *Migdal*. Whereas the former's opinion is circumspect and open to different interpretations, the latter appears much more forceful and unequivocal. They agree that the constitution is hierarchically superior to ordinary laws, a position generally shared by all constitutional regimes that regard the constitution as legally binding rather than as a mere political blueprint. Beyond that, however, whereas *Marbury* asserts that judges are empowered to adjudicate constitutional claims as part of their mandate to decide legal disputes, *Migdal* suggests that the very logic and co-gency of a constitutional system based on the rule of law requires that judges be responsible for interpreting the constitution and for invalidating laws they deem incompatible with it. Do you agree? And if you do, is it nonetheless advisable for judges to step into that role without express authorization granted by the constitution itself?

2. *Marbury* established that the USSC could adjudicate constitutional claims and that its decisions were binding on the parties before it. This has been generally accepted ever since, but the broader implications of *Marbury* are still a matter of dispute. Thus, for example, if a local police officer arrests a citizen for criticizing the government and the Court decrees that the arrest was in violation of the citizen's freedom of speech, then it is clear that the local government and citizen involved are bound by the decision. But what about another local government and another citizen in a similar case? See *Cooper v. Aaron*, 358 U.S. 1 (1958) (governor of Arkansas argued that the USSC decision holding Kansas's law mandating racial segregation in public schools to be unconstitutional was not applicable to Arkansas as it was not a party to the Kansas litigation). In rejecting the governor's argument, a unanimous USSC stressed that *Marbury* had established "the principle that the Federal

judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this court and the country as a permanent and indispensable feature of our constitutional system." Some scholars, however, have criticized this last statement as confusing *Marbury's* "assertion of judicial *authority* to interpret the Constitution with judicial *exclusiveness*." Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expedience in Judicial Review*, 64 Colum. L. Rev. 1, 25 (1964), n.155 (emphasis added). In spite of the Court's broad statement in *Cooper v. Aaron*, the issue of exclusiveness of judicial review is still hotly debated. See, e.g., Edwin Meese III, *The Law of the Constitution*, 61 Tul. L. Rev. 979 (1987) (arguing that since the three branches of the national government are coequal, the U.S. President and the Congress are as authoritative interpreters of the Constitution as is the Supreme Court, and drawing a distinction between "the Constitution"—to which all branches of government are equally bound—and "constitutional law," the law that emerges in judicial interpretations of the Constitution, which is binding on the parties before the courts but not on the other branches of the national government). Does the distinction drawn by Meese (who was the U.S. Attorney General during the Reagan presidency) seem sound and helpful? For a more general discussion of who is bound by constitutional adjudication in various different systems of constitutional review, see Section B below. Finally, contrast the issues left open in the U.S. with the precise prescriptions concerning constitutional review and the authoritativeness of such review under many more-recent constitutions, such as the German Basic Law (Article 93) and the French 1958 Constitution, Article 62 (2): "The decisions of the Constitutional Council shall be binding on the governmental authorities and all administrative and jurisdictional authorities."

3. Lacking a textual constitutional provision on which to rely, Barak bases his conclusion that the Supreme Court of Israel is the authoritative interpreter of claims arising under that country's Basic Laws on two principal considerations. The first focuses on the "culture and tradition of the legal system involved" in general and its "adjudication rule" in particular. The second focuses on the very logic of constitutional government and refers to the seminal work of Hans Kelsen.

Kelsen's views were particularly influential in Europe as he was instrumental in introducing judicial review of the constitution there in the early part of the twentieth century, starting with Austria in 1920. European judicial review, as launched in Europe by Kelsen, relies on a specialized constitutional court and stands in sharp contrast with the older American approach. See Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. Pol. 183 (1942). This contrast is further examined in the excerpt by Victor Ferreres Comella and Alec Stone Sweet below. Moreover, whereas Kelsen's general theory of the constitution and of the need for judicial review is largely compatible with different systems of constitutional adjudication, its conceptual underpinnings are steeped in the European model.

In the broadest terms Kelsen conceives a valid legal system as involving a hierarchy of norms shaped as a pyramid, with the constitution to which he also refers as the *gründnorm* (the basic norm)—standing at the very top. See Hans Kelsen, *General Theory of Law and State* 124 (Anders Wedberg

trans., 1961). Moreover, for Kelsen, the constitution both sets the procedures for adoption of legitimate infraconstitutional laws and imposes substantial constraints on the subject matter or content of valid legislation.

With parliamentary democracy in mind, Kelsen argues that adherence to the requisite hierarchy emanating from the constitution requires a check on the laws passed by the legislature. That check must be provided by an independent institution; and since traditionally the judicial power in Europe was not sufficiently independent from the other branches of government, ordinary judges could not be entrusted with the task. The institution recommended by Kelsen, and later developed throughout Europe and beyond, is the constitutional court, a specialized body made up of independent judges who do not ordinarily come from the ranks of the judiciary. While the constitutional court is an institution designed to check the legislature and control that the latter's enactments are constitutional, it is unclear whether its function is ultimately legislative rather than judicial. In discussing the constitutional court, Kelsen asserts that "[t]he annulment of a law is a legislative function, an act—so to speak—of negative legislation. A court which is competent to abolish laws—individually or generally—functions as a negative legislator." *Id.* at 268. Particularly, after reviewing the materials on judicial interpretation of the constitution below, do you agree that judicial review of constitutional issues is akin to negative legislation? Or do courts also, for all practical purposes, engage in positive legislation when they provide certain interpretive glosses on statutes they evaluate in terms of compatibility with the constitution? Or else, is judicial interpretation altogether different than legislation?

4. Inasmuch as constitutional review may be more akin to legislation—albeit negative legislation—than to mere application of objective rules and standards, it may seem prone to undermining democracy. Thus a statute adopted by a large majority in a democratically elected parliament may be struck down as unconstitutional by a small number of unelected judges serving on the constitutional court. This raises the vexing problems of democratic legitimacy of judicial review and constitutional interpretation leading to invalidation or to what amounts to a "rewriting" of popular laws. In the U.S., the problem in question is known as the "countermajoritarian difficulty," and it has generated an immense literature. *See, e.g.,* Alexander Bickel, *The Least Dangerous Branch* (2d ed. 1986) (justifying judicial review notwithstanding that it is countermajoritarian); and John Hart Ely, *Democracy and Distrust* (1980) (defending judicial review inasmuch as it buttresses, and makes up for flaws in, the democratic process). Barak acknowledges that judicial review is countermajoritarian but emphasizes that democracy should not be reduced to majoritarianism. According to him, legitimate democracy depends as much on adherence to fundamental rights and the rule of law as on reliance on majoritarian legislation. In spite of Barak's justification of judicial review in terms of Israel's legal tradition, logic, and democracy, the sweeping powers of constitutional review established in *Migdal* have led to an undermining of the Court's legitimacy as a large segment of the Israeli population regards the Court as furthering a contested and divisive political agenda rather than merely upholding entrenched constitutional norms. This has recently led to an initiative by the Minister of Justice to curtail the Court's powers to invalidate legislation that tramples on human rights. *See* Tova Tzimuki, *Friedmann Seeks to Limit High Court's Authority*, Israel

News, March 9, 2008.^b Do the Israeli Supreme Court's legitimacy problems stem from a lack of precise delimitation of the powers of judicial review or, rather, from the lack of a written constitution? In contrast to Israel, the U.S. enjoys both a written constitution and broad consensus concerning the legitimacy of judicial review as such if not on the exclusiveness or scope of such review. Nonetheless, the USSC is by no means immune from attacks on the grounds that it is too political. Unlike in Israel, however, in the U.S. the controversy is much less over judicial review itself than over its scope and over the proper canons of constitutional interpretation. Could that latter controversy be altogether eliminated or significantly reduced by means of detailed constitutional provisions regarding the powers, scope, and extent of judicial review of constitutional claims? Even in Germany, where the Constitution explicitly institutes the Federal Constitutional Court as its authoritative interpreter and where the scope of judicial review is precisely delimited (*see* German Basic Law, Art. 93), the Court is not immune to the charge that it has an undue impact on democratic politics.

Indeed the power of parliamentary minorities to challenge laws they oppose as unconstitutional before the Constitutional Court, combined with the latter's broad conception of its powers of interpretation, has led to the perception that frustrated legislative minorities, after failing to defeat a piece of legislation in Parliament, often get a second chance—by persuading the Court to declare it unconstitutional. Does this mean that, ultimately, it makes little difference whether the constitution is precise, vague, or silent regarding judicial review?

5. One way of dealing with the problem of democratic legitimacy of judicial review is by denying such review irrevocable finality. While in most constitutional democracies, the constraints imposed as a result of judicial interpretation of the constitution can only be by means of constitutional amendments, in Canada the Constitution allows for parliamentary override of specific provisions of the Charter of Rights and Freedoms and, by extension, of judicial interpretations of those provisions. *See* Canada Constitution Act, 1982, Sec 33. According to this override provision, the federal Parliament or a provincial legislature may declare by a simple majority that legislation that runs counter to a judicial interpretation of a right protected by the Constitution is valid, notwithstanding the conflict. The override involved cannot be extended to those rights that are essential to the democratic process itself, and it expires automatically after five years, though it can be extended by new legislation at that time. Although the override provision has been sometimes used by the Quebec legislature, it has had little impact in the rest of Canada. Is it significant, in this respect, that Quebec has not ratified the 1982 Constitution Act while the rest of the country has? It has been argued that availability of the override provision has both afforded greater latitude to the Canadian Supreme Court and infused its decisions with greater legitimacy. Indeed the Court need not worry as much as it would have absent any override because it knows that if its decisions run deeply counter to the prevailing consensus, the legislature can act to remedy the situation. On the other hand legislatures (outside Quebec) are reluctant to trigger the override as they run the risk of being perceived as lacking respect for the fundamental rights enshrined in

b. Available at <http://www.ynetnews.com/articles/0,7340,L-3591427,00.html> (last visited August 22, 2009).

the Constitution. See Peter Hogg, *Constitutional Law of Canada* 914–17 (4th ed. 1997). Do you agree that existence of an override provision paradoxically enhances the legitimacy of judicial review and reinforces its finality? Or might the reason for stability in Canada be that, outside of Quebec, there is broad consensus on constitutional rights?

B. PRINCIPAL MODELS OF CONSTITUTIONAL ADJUDICATION

B.1. THE CENTRALIZED VERSUS DECENTRALIZED MODEL: ABSTRACT VERSUS CONCRETE REVIEW

As to the structure of the courts dealing with constitutional review, there are two principal models of judicial review relating to the constitution: the centralized model, which originated in Europe, and the decentralized one, first established in the U.S. In terms of subject matter,

[t]here are three basic types of review jurisdiction: abstract review, concrete review, and the individual constitutional complaint procedure. Abstract review is 'abstract' because the review of legislation takes place in the absence of litigation, in American parlance, in the absence of a concrete case or controversy. Concrete review is 'concrete' because the review of legislation, or other public act, constitutes a separate stage in an ongoing judicial process (litigation in the ordinary courts). In individual complaints, a private individual alleges the violation of a constitutional right by a public act or governmental official, and requests redress from the court for this violation.

Abstract review processes result in decisions on the constitutionality of legislation that has been adopted by parliament but has not yet entered into force (France), or that has been adopted and promulgated, but not yet applied (Germany, Italy, Spain).

—Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, 44–45 (2000).

Victor Ferreres Comella, *The Rise of Constitutional Courts*

CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE
3–9 (2010)

Let's go back to 1920. It is very unlikely that the framers of the constitutions of the new republics of Czechoslovakia and Austria imagined that the institution they had just created (a constitutional court) would be so popular nowadays. Before the Second World War, only Lichtenstein (in 1921) and Spain (in 1931) had decided to establish such a court. The other countries in Europe remained impervious to the invention.

During that period, a particularly powerful voice, that of Hans Kelsen, could be heard in support of the new system. This important legal philoso-

pher (who lived from 1881 to 1973) was very influential in the construction of the Austrian Constitutional Court—where he served as a judge from 1921 to 1930. * * * Kelsen * * * wrote extensively in favor of subjecting legislation to some type of judicial review and in favor of the centralized model, in particular, as opposed to the American alternative. * * *

After the Second World War, things started to change in a dramatic way. Italy (in 1947), Germany (in 1949), and France (in 1958) enacted new constitutions whose protection against ordinary legislation was entrusted to a constitutional tribunal. After their transitions to democracy, Portugal (in 1982) and Spain (in 1978) introduced such a court in their new constitutions too. Belgium and Luxemburg joined the club as well (in 1980 and 1996, respectively). And after the fall of communism, almost all Central and Eastern European countries followed suit.

In particular, eighteen out of the twenty-seven states that currently belong to the European Union—Austria, Belgium, Bulgaria, Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain—have created constitutional courts, a figure that shows the extent to which there is a strong preference for such institutions in the region. Only three countries within the European Union have adopted a system of judicial review similar to that of the United States: Sweden, Finland, and Denmark. In practice, though, courts in these Nordic countries very rarely find a statute unconstitutional.

Of the six remaining countries within the European Union, four—Ireland, Greece, Cyprus, and Estonia—have adopted systems that are difficult to classify because they combine features of the American and the European models in different ways. The other two countries, the Netherlands and the United Kingdom, are exceptional in that they have no system of constitutional review of legislation. The Constitution of the Kingdom of the Netherlands explicitly prohibits judges from setting aside legislation on constitutional grounds. Judges lack that capacity in the United Kingdom as well. The Human Rights Act 1998, which came into force in October 2000, has empowered certain U.K. superior courts to declare that a given statute is incompatible with any of the human rights that are enumerated in the act. (The act incorporates the European Convention on Human Rights into the domestic legal system.) Such a judicial declaration, however, does not mean that the statute is invalidated or set aside. Courts must still enforce it. The effect of a declaration of incompatibility is mainly political: the British Parliament is expected to modify a law that a court has found to violate a human right, but it may elect not to do so. Parliament is still sovereign.

The centralized model, which is clearly dominant within the European Union, has also had some influence in other regions. In Latin America, for example, some countries have gradually departed from the American model that was originally established in the nineteenth century and have moved toward a mixed system that includes some components of the centralized model. The system is mixed in that all courts are usually empowered to exercise constitutional review in the course of ordinary adjudication, but in addition, legislation can be formally invalidated by a specific body. For these purposes, some countries (Peru, Guatemala, Chile, Ecuador, Bolivia, Colombia) have introduced constitutional courts, whereas others (Costa Rica, El Salvador,

Honduras, Nicaragua, Paraguay, Venezuela) have created a special constitutional chamber within the existing supreme court. We also find constitutional courts in other parts of the world (in South Korea, Indonesia, Thailand, South Africa, Egypt, and Turkey, for example).

The Basic Features of the European Model

* * * We must briefly consider three questions: (1) Over what matters does the constitutional court have jurisdiction? (2) Who is authorized to ask the court to review the constitutionality of a statute? (3) What are the effects of the court's decisions? * * *

Functions of the Constitutional Court

* * * [W]hat defines the European model is the existence of a special institution—the constitutional court—in charge of assessing the constitutionality of legislation. This institution is granted a monopoly in this field: no other court—not even the supreme court—is entitled to disregard a parliamentary statute on its own authority. In many countries, ordinary judges * * * are allowed to stay the proceedings of a given case in order to make an application to the constitutional court for the annulment of a statute that they think is inconsistent with the constitution. They are not authorized, however, to disregard the statutory provision themselves.

* * * [C]onstitutional courts differ as to the relative prominence of legislative review within their portfolio of responsibilities. Constitutional courts are sometimes given jurisdiction to supervise the regularity of elections and referenda, for example, or to verify the legality of political parties or to enforce the criminal law against high governmental authorities or to protect fundamental rights against administrative and judicial decisions. Most of these tasks are still “constitutional” in that they require the interpretation and enforcement of constitutional provisions, but others are not: they merely involve ordinary law. We can say that a constitutional court is not “pure” when, apart from reviewing legislation, it has some other functions. The more important those other functions are, the larger the workload they generate, and the closer they are conceptually to the enforcement of ordinary law, the less pure the constitutional court is.

We can thus locate constitutional courts along a spectrum of purity. At one extreme, we find absolutely pure constitutional courts, whose only job is to review legislation for its constitutionality (Belgium and Luxembourg). In the middle, we find courts that perform some additional tasks, although their main activity is still legislative review (France, Italy, and Portugal). At the other end of the spectrum, courts have jurisdiction over so many different matters that it would be wrong to say that, in terms of everyday practice, their most important function is to determine the constitutionality of legislation (Germany, Austria and Spain).

Access to the Court

Let us now turn to the issue of standing. Various procedures have been established in different European countries to submit claims to the constitutional court that a particular statute is unconstitutional. One type of procedure is initiated through constitutional challenges, which are usually brought by public institutions, such as the executive, the ombudsman, the general prosecutor, the parliament, or a qualified minority of the parliament. In

some countries, private individuals are also allowed to bring such challenges. Through this type of procedure, legislative provisions are attacked directly and in the abstract—the procedure is not tied to any specific controversy. Normally, the challenge must be filed after the statute has been promulgated. In some jurisdictions, however, preventive (*a priori*) review is permitted: statutes can be attacked before they are promulgated.

A second way to get to the court is through so-called constitutional questions, which are initiated in the course of ordinary adjudication. When regular judges handling specific disputes believe that the applicable statute is unconstitutional, or have doubts about its validity, they stay the proceedings and certify the issue to the constitutional court. The latter will simply declare whether the statute is valid. It is then for the ordinary judges who raised the question to decide the specific controversies in light of the answer provided by the constitutional court.

In some countries (Spain, Germany, and Austria), there is a third way to invoke the jurisdiction of the constitutional court. Individuals can file a constitutional complaint alleging that one of their fundamental rights has been violated by public authorities. In most cases in which the complaint is justified, the breach of the fundamental right stems from an incorrect interpretation or application of the relevant statute or body of law. But sometimes it is the statute itself that is at fault. In such instances, the constitutional court will review the statute and determine its validity.

A fourth type of procedure exists in Portugal. [T]he Portuguese system is exceptional in that regular courts are permitted to disregard legislation they find unconstitutional. Their rulings can then be appealed to the Constitutional Court by the parties to the case (or by the public prosecutor). The Constitutional Court's jurisdiction is limited, however: it can decide only whether the lower court got it right when it disregarded, or upheld, the pertinent piece of legislation.

So there are variations within the European model. Obviously, a constitutional tribunal is more or less detached from the ordinary judiciary, depending on the type of procedures that can be used to attack a statute. In the context of abstract challenges, the tribunal is not linked to the regular courts. In contrast, there is such a link when ordinary judges raise constitutional questions. The link is even stronger when the constitutional tribunal has jurisdiction to review decisions rendered by ordinary judges, as in the complaints procedure or in the appeals procedure of Portugal. The dualist structure that characterizes the European model can thus be more or less rigid.

This, of course, has implications for how “abstract” or how “concrete” the system of legislative review is. The general tendency in Western Europe is for constitutional courts to scrutinize the laws in the context of specific cases—through constitutional questions, individual complaints, or appeals of the Portuguese sort. Abstract review initiated by means of constitutional challenges is less frequent in practice. Until very recently, France represented the most prominent exception to this general pattern, for abstract review brought by public institutions was the only kind of review that the French Constitutional Council could engage in. An important constitutional amendment of July 23, 2008, however, has deeply transformed the French system. Ordinary judges are now empowered to certify questions to the Constitutional Council, if the applicable law is

attacked on the grounds that it violates one of the constitutionally guaranteed rights or liberties. (Such questions, however, must be filtered by the Court of Cassation, the highest court of ordinary jurisdiction, or the Council of State, the highest administrative court.) Abstract review is thus combined with concrete review. It is likely that in the near future, a great number of statutes will be tested by the French Constitutional Council in the context of questions raised by ordinary judges, as has happened in other European countries. The general practice in Central and Eastern Europe, in contrast, seems to more strongly center around abstract review. According to Wojciech Sadurski, abstract review, which has been established in all the countries in that region, is widely used, whereas concrete review initiated by regular courts is rarely practiced.

Effects of the Court's Decisions

Finally, what about the effects of the decisions handed down by the constitutional court? In general, when the court declares that a statute is unconstitutional, its decision is binding on everyone. It produces "erga omnes effects," as the expression goes. The statute is effectively repealed, and no court or governmental organ is allowed to apply it.

When the court upholds a statute, in contrast, one may still challenge that statute in the future by bringing new objections in subsequent proceedings. Of course, if the court reviews the statute not only in light of the specific grounds that the challengers have adduced in their briefs but also in light of additional reasons that the court articulates *sua sponte*, its conclusion that the statute is constitutional is harder to revisit in the future. Still, there is always some room for further judicial examination, whereas if the statute is invalidated, that's the end of the story. (A new statute with the same provisions would have to be passed by the legislature in order for the constitutional court to have the opportunity to take a second look at the underlying issue.)

It is important to note, however, that constitutional courts quite often hand down "intermediate" decisions that identify the constitutional defects of a given statute but do not immediately invalidate it. Courts, for example, sometimes suspend the effects of their decisions declaring a law unconstitutional in order to give the parliament enough time to repair the defects. In other cases, they issue a "reconstructive" decision that directly amends the defective statute to make it comport with the constitution. These and other techniques have been crafted to satisfy practical needs. Experience has shown that the dichotomy between striking down statutes, on the one hand, and fully upholding their constitutionality, on the other, is unacceptably rigid.

* * *

Notes and Questions

1. Of the European constitutional courts, the French Constitutional Council seems by far the most political. Its contemplated function under France's 1958 Constitution was to ensure, above all, that Parliament not infringe on the newly expanded powers of the executive concentrated in the strong presidency crafted for the Fifth Republic's principal architect, Charles de Gaulle. As Alec Stone Sweet remarks:

[T]he new constitutionalism emerged [in France] by a * * * circuitous route. * * * The Gaullists replaced France's traditional, British-style, parliamentary system with a 'mixed presidential-parliamentary' one, strengthening the executive. The constitution established a Constitutional Council, but its purpose was to guarantee the dominance of the executive (the government) over a weak parliament. Beginning in 1971, however, the Council began to assert its independence. In that year, for the first time, it declared a government-sponsored law unconstitutional on the grounds that the law violated constitutional rights. This decision paved the way for the incorporation of a charter of rights into the 1958 constitution, a charter that the Council has taken upon itself to enforce. Thus, for the first time, and against the wishes of de Gaulle, his agents, and the other political parties in 1958, France has both an effective bill of rights and an effective constitutional court.

—Stone Sweet, *Governing with Judges*, 41.

Stone Sweet specifies:

[A]lthough its rule in reviewing legislation was that of a referee engaged in settling conflicts between the executive and the legislature, *the Council was not meant to be a fair or impartial referee* (any more than the constitution was designed to be fair or impartial). Its field of play was to be exclusively parliamentary space; it was to have jurisdiction only over legislative and not executive acts; and a proposal to balance the equation—to allow legislative authorities to refer executive acts to the Council—was not seriously considered * * *.

—Stone Sweet, *The Birth of Judicial Politics in France*, 48 (1992).

2. He further observes:

1. Constitutional adjudication * * * is implicated in the exercise of legislative power. If in exercising review authority, the judges simply controlled the integrity of parliamentary procedures, and not the substance of legislation, the judges would be relatively minor policy-makers (akin to Kelsen's 'negative legislator'). But the judges possess jurisdiction over rights which are, by definition, substantive constraints on law-making powers. The political parties thus transferred their own entirely unresolved problem—what is the nature and purpose of any given rights provision, and what is the normative relationship of that provision to the rest of the constitutional text?—to judges. This transfer constitutes a massive, virtually open-ended delegation of policy-making authority. * * *

—Stone Sweet, *Governing With Judges*, 48.

What implications derive from this?

3. The role of the Constitutional Council changed dramatically, however, as a consequence of its landmark 1971 *Associations Law Decision*, 71–41 DC of 16 July 1971 (as summarized and translated in John Bell, *French Constitutional Law*, 272–73 (1992)):

Background: This is the first decision of the Conseil constitutionnel that struck down a provision of a *loi* for breach of fundamental rights. Its justification appealed to the Preamble of the 1958 Constitution and to a fundamental principle recognized by the laws of the Republic, to be found in the

loi of 1 July 1901 on associations. That loi provides that, before an association may be recognized as having legal status, it must file certain particulars with the prefect, who must then issue a certificate of registration.

In this case the National Assembly sought, against the opposition of the Senate, to pass a loi that would empower the prefect to refuse registration pending a reference to the courts over the legality of the objectives of a proposed association. The President of the Senate referred the loi to the Conseil. The principal issue was the constitutionality of prior restraint of the freedom of association.

Decision

* * * In the light of the *ordonnance* of 7 November 1958 creating the organic law on the Conseil constitutionnel, especially chapter 2 of title II of the said *ordonnance*;

In the light of the *loi* 1 July 1901 (as amended) relating to associations;

In the light of the loi of 10 January 1936 relating to combat groups and private militias;

1. Considering that the *loi* referred for scrutiny by the [Constitutional Council] was put to the vote in both chambers, following one of the procedures provided for in the Constitution, during the parliamentary session beginning on 2 April 1971;

2. Considering that, among the fundamental principles recognized by the laws of the republic and solemnly reaffirmed by the Constitution, is to be found the freedom of association; that this principle underlines the general provisions of the *loi* of 1 July 1901; that, by virtue of this principle, associations may be formed freely and can be registered simply on condition of the deposition of a prior declaration; that, thus, with the exception of measures that may be taken against certain types of association, the validity of the creation of an association cannot be subordinated to the prior intervention of an administrative or judicial authority, even where the association appears to be invalid or to have an illegal purpose. * * *

From a purely formal standpoint, this decision falls within the powers explicitly granted to the Constitutional Council by the 1958 Constitution. See the excerpt by Stone Sweet, *above*. From a substantive standpoint, in contrast, this decision is truly a transformative one as it paves the way for the Council to evolve from a narrowly confined arbiter of the boundary between executive and legislative powers to a guardian of fundamental individual rights against legislative infringement. As F. L. Morton observes:

In the 1970's, two events transformed the *Conseil Constitutionnel* from a secondary and relatively unimportant institution to a central agent in the governing process. [Because of the *Associations Law Decision* above,] *Parlement's* freedom to legislate was suddenly fenced in by the full panoply of liberal rights and freedoms. Subsequent decisions incorporated additional rights declared in previous French laws and constitutions. By 1987, "fundamental rights" accounted for forty percent of the *Conseil's* annulment of ordinary laws.

The second catalyst of the *Conseil's* rise to political prominence was the

1974 reform that extended its authority to rule on the constitutionality of a law upon petition by any sixty members of the National Assembly or the Senate. * * * The 1974 reform conferred th[e] power of reference on opposition parties (providing they could muster sixty signatures), who immediately seized this opportunity as a way to obstruct, at least temporarily, new government policies. By 1987, parliamentary references accounted for eighty percent of all decisions dealing with ordinary laws. Even more striking—since 1979, forty-six of the forty-eight decisions nullifying laws have been initiated by members of *Parlement*. * * *

It is now common practice for all major government bills to be challenged * * * by the opposition. The more important the bill, the more likely the challenge. Combined with the vastly expanded scope of constitutional restrictions imposed by the Declaration of the Rights of Man and other implied liberties, this new procedure has thrust the *Conseil Constitutionnel* to the center of the policymaking process. It is now a “hurdle” that every major piece of legislation must clear before becoming law.

—F. L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 Am. J. Comp. L. 89, 90–92 (1988).

While there is an ongoing debate as to whether it is a true court (see id. at 106), by examining legislation to test the latter’s compatibility with constitutionally protected individual rights, the Constitutional Council performs essentially the same task as other constitutional courts or the U.S. courts when it adjudicates constitutional claims. Does this mean that, since 1971, the Council has become a genuine court? Or did the fact that (prior to the reform of July 23, 2008) only politicians could raise issues before it, and could do so only before a law went into effect, relegate the Council to a mere extension of the legislature, making it a political body rather than a judicial one?

4. Constitutional courts are to varying degrees political rather than solely judicial bodies. Is this due to their structure and place in the parliamentary systems in which they are embedded? Or does it stem from the very nature of constitutional review? In this connection it may be useful to focus on the salient features of the decentralized system of constitutional review based on the American model. In the U.S., both federal and state courts are empowered to adjudicate constitutional claims that arise in the course of ordinary litigation. Article III of the U.S. Constitution confines the jurisdiction of federal courts to “cases or controversies,” precluding abstract review or advisory opinions. Because of this, constitutional adjudication is concrete, spread out, and piecemeal. American courts, moreover, are not supposed to adjudicate constitutional claims raised in cases before them unless the particular case at stake cannot be resolved without deciding the constitutional claim(s) involved. Thus, for example, if a plaintiff seeks a judgment on both statutory and constitutional grounds, a determination that such plaintiff should prevail on statutory grounds obviates the need for the court involved to consider the constitutional claim. See, e.g., *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (four of the nine justices held that the case could be decided on statutory grounds obviating the need to adjudicate the constitutional issues raised by plaintiff). Furthermore, as a consequence of decentralization, different courts may well adjudicate similar claims in diametrically opposed ways. Unity within the system is eventually achieved through adjudication by

the USSC, which binds all courts within the country. Whereas all decisions of the highest state courts and of the federal courts of appeals relating to constitutional issues may be appealed to the USSC, since 1988 the latter enjoys virtually unlimited discretion in the selection of cases for review. See 28 U.S.C. § 1257 (1988). Indeed the USSC can agree to entertain an appeal by granting a writ of certiorari, which requires an affirmative vote of four of the nine justices. Often, in the context of a controversial issue, the USSC awaits the development of different, at times contradictory, jurisprudences among various lower courts before agreeing to tackle such issues, to bring unity within the system. Presumably, the Court does so to be in a better position to evaluate the relative merits and drawbacks of the clashing approaches reflected in the decisions below it, by benefiting from the accumulated experience regarding plausible approaches to important constitutional issues. Does this way of proceeding render the American approach less prone than its European counterparts to being coopted by politics? Cf. Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, Int'l J. Const. L. (I·CON) 633, 635 (2004) ("American constitutional adjudication has been attacked much more vehemently for being unduly political than its European counterpart," and suggesting that the reasons for this relate to consensus on fundamental values and broader issues of institutional design).

5. The Kelsenian objective of setting constitutional courts as "negative legislators" is compromised when such courts evaluate legislation in terms of compatibility with fundamental rights. Indeed, given the generality of rights such as free speech, equality, privacy, and the like, and given their amenability to a variety of interpretations, constitutional courts charged with enforcing them seem bound to enjoy great latitude to set public policy, thus becoming "positive legislators" while lacking the democratic legitimacy enjoyed by parliaments. Whether constitutional adjudicators are more like legislators than like judges depends significantly on the nature, scope, and limits of constitutional interpretation, which are addressed below. To some extent, however, the functioning of a constitutional court as a positive legislator seems to depend on institutional factors, as indicated by the discussion of the French Constitutional Council, above. In this respect the German Federal Constitutional Court (GCC) provides an interesting example, inasmuch as it engages in abstract as well as concrete review and deals with matters initiated by members of Parliament as well as with claims brought by individuals. Consider the following description of the GCC's jurisdiction.

Wolfgang Zeidler, *The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*

62 NOTRE DAME L. REV. 504, 504–507 (1987)

In the Federal Republic of Germany, the Federal Constitutional Court is the principal body of constitutional jurisdiction. The Court's exclusive jurisdiction is to decide constitutional questions arising under the Federal Republic's Constitution, the Basic Law (das Grundgesetz). A constitution, particularly one that contains an extensive catalogue of basic rights binding on all public authority, will necessitate a greater degree of interpretation than other legal norms. Unlike other courts of last resort, access to the Federal Constitutional

Court is limited, except in the case of constitutional complaints, to state and federal governments, state and federal courts, and parliamentary groups such as party factions and minorities in national and state legislatures. * * *

I. Categories of Disputes

Nearly all of the Federal Constitutional Court's jurisdiction, covering fourteen types of disputes, is defined in the Basic Law.^c The most significant areas of review involve abstract and concrete judicial review and constitutional complaints. There are no statutory provisions for a preventative or an advisory judicial review of legal norms. The Law Concerning the Federal Constitutional Court originally provided for the possibility of obtaining advisory opinions. The provision was soon dropped, however, in view of the difficulties that arose in conjunction with the binding nature of such decisions.

A. Abstract Judicial Review

The federal government, a state government, or one-third of the Bundestag may require the Federal Constitutional Court to determine the compatibility of federal or state law with the Basic Law as well as the compatibility of state law with any other federal law. All legal norms, including laws properly passed by Parliament, statutory orders, by-laws adopted by municipalities or other types of corporate bodies may be subjected to this review. This procedure may also be used to ascertain the validity of a norm after a court of law, an administrative authority, any body of the Federal Republic or a state has refused to implement the law because it was not compatible with the Basic Law. In practice, the party requesting an abstract judicial review is frequently the political opposition in the Bundestag or a state government ruled by the opposition party. Commentators critically note that it is only the political disputes which were unsuccessfully resolved in the Bundestag that are continued in the courtroom. Because an abstract judicial review forces the Federal Constitutional Court to decide the constitutionality of a legal norm without access to sufficient information regarding the implementation of the norm or its implications, this review procedure has been subject to criticism.

B. Concrete Judicial Review

Any court that employs a legal norm, upon which its decision depends, must first examine the compatibility of this norm with a higher norm, especially the Basic Law. If a court reaches the conclusion, mere doubts will not suffice, that a law passed by Parliament, a formal law, is not compatible with the Basic Law then the court must discontinue the proceedings and certify the question of compatibility to the Federal Constitutional Court. The Court will only decide whether or not the submitted legal norm is compatible with the Basic Law. Subsequently, a concrete ruling on the matter must be made by the proper specialized court. The exclusive power of the Federal Constitutional Court to proclaim a formal law unconstitutional is intended to foreclose a lower court from bypassing the will of the democratic legislature by means of declaring a law unconstitutional.

C. Constitutional Complaints

Unlike the other methods of judicial review, a constitutional complaint can be lodged by any person asserting a violation by a public authority of ei-

c. The GCC decided 82,516 cases between 1951 and 1994.

ther basic rights or certain other constitutional rights (such as the right to be heard). The constitutional complaint can be lodged against any act of public authority, including measures taken by administrative agencies or court decisions. However, available legal recourse must be exhausted prior to any such review by the Federal Constitutional Court. * * *

Regardless of the context of the constitutional complaint, the Federal Constitutional Court examines the constitutionality of the legal norms, whether express or implied. As a result, numerous decisions of the court on constitutional complaints concern the compatibility of laws or other legal norms with the Basic Law. One must note here, however, that a review of the constitutionality of a norm, within the framework of a constitutional complaint proceeding, would be precluded when there remains no question whatsoever about the subjective legal position of the complainant but only about other objective rules and regulations of constitutional law. The practical impact of this limitation is curtailed by the fact that the Federal Constitutional Court interprets the Basic Law to include not only the grant of a general freedom to develop one's personality but also as to incorporate the constitutional right to remain unencumbered by public authority exercised with no constitutional basis. As such, one must also examine within the framework of a constitutional complaint objections claiming a deficiency of legislative authority of the Federal Republic or citing a faulty drafting process.

D. Other Methods of Procedure

The incidental review of legal norms has arisen in the context of judicial disputes between public bodies concerning the respective rights and duties of not only the highest federal bodies but also of parliamentary groups and parties as well. For example, the authority of the Federal Constitutional Court to rule on complaints against decisions by the Bundestag pertaining to the validity of elections led to a review of the constitutionality of the Federal Election Laws.

E. Legislative Omissions

Legislative omissions can also be the subject of a ruling by the Federal Constitutional Court. Such cases pose many problems, including the determination of the unconstitutionality of a present legal condition and appeals to the legislature. Although not intended to be exhaustive, the following examples may serve as illustrative: Constitutionally required mandates, the constitutional duty to regulate by law the basic rights and duties of a certain group of people, the constitutional duty of the legislature to take into consideration changes in actual conditions, as well as disparities which are incompatible with the principle of equality. These examples range from cases involving genuine omission (the legislature does not act in defiance of a specific constitutional mandate) and lack of implementation (the legislature has not acted for a long time) to discrimination (the legislature acted, but failed to consider a certain group).

John Bell, *Jurisdiction of the French Constitutional Council*

FRENCH CONSTITUTIONAL LAW, 30-33 (1992)

First, the Conseil is an election court * * * The caseload is quite considerable. As a result of the parliamentary elections of June 1988, some eighty-five

decisions on electoral matters are reported in the annual *Recueil* of decisions of the Conseil constitutionnel. * * *

* * *

Secondly, the Conseil also advises the President both when he seeks to use emergency powers under article 16 and on the rules made thereunder. Such advice is not binding, but it is of considerable authority all the same. * * *

Thirdly, the Conseil may also be asked to rule on the constitutionality of treaties. Treaties are signed by the President, but require parliamentary legislation in most cases before they can be ratified. Once ratified, they have a status superior to lois (article 55). Although the Conseil constitutionnel will not strike down a loi for incompatibility with a treaty, other courts may refuse to apply it in such a case. Prior examination of the compatibility of a treaty and the Constitution is thus desirable. [See *Amsterdam Treaty* decision, Chapter 1.]

* * *

Fourthly, the Conseil also examines the constitutionality of organic laws and parliamentary standing orders. Both are subject to compulsory review by the review by the Conseil before they are promulgated (article 61 § 1).

* * *

Fifthly, the Conseil had, as its primary original function, to police the boundaries of the legislative competence of Parliament and of the executive. * * *

* * *

(3) Once a loi has been passed by Parliament, the Conseil has jurisdiction to rule on its constitutionality * * *

Notes and Questions

1. It is argued that abstract review initiated by officials in the various branches of government is what renders a constitutional court more akin to a political body than to a judicial one. Do you agree?

2. Are the distinctions between the “negative” and “positive” legislator and “abstract” and “concrete” review that important in terms of whether constitutional courts are ultimately political rather than judicial bodies? On the surface a “negative” legislator has much less power than a “positive” one, in that the former can only block legislation while the latter can also reshape it. Nevertheless, to the extent that they both enjoy a significant degree of interpretive discretion, is it not as political and as antimajoritarian to strike down popular legislation at the behest of a small legislative minority (e.g., the 60 members of the National Assembly, who can challenge a law before it is promulgated before the French Constitutional Council, represent barely more than 10 percent of the Assembly’s deputies) as it is for constitutional judges essentially to rewrite it?

In theory abstract review affords greater discretion to the constitutional judge than concrete review. This is presumably because, in the case of con-

crete review, the judge is constrained by the facts of the case at hand, over which the judge in question has no control. Upon closer scrutiny, however, this distinction may be less important than it seems initially as other factors may have a far greater impact on the discretion of the constitutional judge. For example, in the U.S., the prevailing common law tradition has long given judges fairly broad powers to shape the law by enabling them to develop and adapt legal rules through interpretation, expansion, or limitation of precedents. Furthermore, concrete review can certainly be cast very narrowly to address nothing more than the actual dispute before the Court when adjudicating constitutional issues. Such narrow casting, however, may be undesirable in constitutional cases as it would offer too little guidance for future enforcement of the constitution. Consistent with this, although limited to concrete review by the "case-or-controversy" requirement, the USSC had tended to cast its opinions in broader strokes than strictly necessary to resolve the concrete conflicts before it. For example, in its landmark abortion decision, *Roe v. Wade*, 410 U.S. 113 (1973) (see Chapter 5), the Court had before it a challenge by a woman seeking an abortion against a Texas law that made abortion a crime unless necessary to save the life of the mother. The woman who contested the law did not claim that her life would be in danger if she did not abort. Accordingly, the Court, strictly speaking, should have limited its decision to a determination of whether the Texas abortion law was unconstitutional as applied against a woman in the circumstances of the woman who raised the challenge. Instead, however, the Court divided pregnancy into three trimesters and provided standards for when abortions could or could not be criminalized. See Chapter 5. Is this more akin to judicial lawmaking than to straightforward adjudication?

B.2. THE INDEPENDENCE OF THE CONSTITUTIONAL ADJUDICATOR: APPOINTMENTS, COURT COMPOSITION, AND RELATIONS WITH THE OTHER BRANCHES OF GOVERNMENT

The independence of the constitutional adjudicator depends on many factors, including *inter alia*, the legal and political culture and traditions. For example, as noted above, ordinary judges in civil law systems did not enjoy the tradition of independence of their common law counterparts, and that figured prominently in the need for constitutional courts. Beyond this, independence also depends on the mode of appointment, the terms and conditions of service of adjudicators, the composition of the adjudicatory body, and its relation to the other branches of government. We consider these issues here in the context of constitutional adjudication. For further discussion of judicial independence in the context of separation of powers; see Chapter 3.

Appointments to the French Constitutional Council are made one-third by the President of the Republic, one-third by the President of the National Assembly, and one-third by the President of the Senate. There are nine members of the Council who serve for a single nine-year term, and as the terms on the Council are staggered (every three years there are three new appointees), each of the three persons with appointment power can make one appointment every three years. Given that many of the appointees have a political rather than le-

gal background and that appointments are political—inasmuch as those who appoint choose persons within their own political party or with clear ties to their party—the Council is certainly in many respects a political body. In other respects, however, the Council functions more as a judicial body, in large part due to the role it assumed in the *Associations Law Decision*, above, namely, that of an institutional guardian of fundamental rights against infringement by challenged legislation. Finally, the degree to which the Council functions as a judicial rather than a political body depends in significant measure on the institutional vision of its members. Thus, under the presidency of Robert Badinter (1986–1995), a noted jurist and former Minister of Justice, the Council enhanced its profile as a judicial body. In contrast, one of the Council's more recent presidents, Yves Guéna, a former president of the French Senate and close collaborator of Charles De Gaulle, regards the proper role of the Council more in terms of its original mission, as mediator between the legislature and executive, than as an activist constitutional court.

Although there is a significant overlap of functions between their respective institutional roles, other constitutional courts differ in many key respects from the French Constitutional Council.

Alec Stone Sweet, *Constitutional Adjudication and Parliamentary Democracy*

GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE
31, 46–49 (2000)

Composition

[Based on the rules governing the recruitment of constitutional judges in France, Germany, Italy, and Spain, two] modes of appointment exist—nomination and election. Where nomination procedures are used, the appointing authority simply names a judge or a slate of judges; no countervailing confirmation or veto procedures exist. Such is the case of France, where all constitutional judges are named by political authorities. Italy and Spain have mixed nomination and election systems. Where election systems are used, a qualified, or super, majority (a 2/3 or 3/5 vote) within a parliamentary body is necessary for appointment. Because the German, Italian, and Spanish polities are multi-party systems, and because no single party has ever possessed a super-majority on its own, the qualified majority requirement effectively necessitates the parties to negotiate with each other in order to achieve consensus on a slate of candidates. This bargaining process occurs in intense, behind-closed-doors negotiations. In practice, these negotiations determine which party will fill vacancies on the court, with allocations usually roughly proportionate to relative parliamentary strength.

* * * All German, Italian, and Spanish judges must have had advanced legal training, as well as professional experience in some domain of law. The constitution may also contain precise quotas, guaranteeing a minimal number of professional judges drawn from the ordinary courts. In Germany, the sixteen-member court must always contain at least six federal judges; in Italy, representatives of the judiciary control the appointment of 5/15 seats; and in Spain, they control 2/12. In France, no legal training is required. * * * In Germany, Italy, and Spain, law professors make up the largest group of appointees, followed by former ordinary judges and lawyers * * *.

In France and Italy, decisions are presented as unanimous, and publication of votes and dissents are prohibited by law. In Germany and Spain dissents are permitted but rare. In all cases, internal deliberations are, by law, secret * * *

Note on Appointment to the U.S. Supreme Court

In the U.S., Article II, Sec. 2 of the Constitution provides that the President nominates justices to the Supreme Court and that such nominees are appointed upon the "advice and consent" of the Senate, that is, upon the affirmative vote of a majority of senators. Appointments are for life, and justices can be removed only through impeachment for violation of the standard of "good behavior" set by Article III, Sec. I of the Constitution. To date, no justice has been removed by impeachment, but proceedings were brought in 1805 against Justice Samuel Chase, who had been nominated to the Court by George Washington and who was eventually acquitted in a trial in the U.S. Senate.

The Senate has by no means rubber stamped presidential nominations to the high court. Approximately a quarter of the nominations have been rejected. The Constitution does not set qualifications for justices, but the Senate's confirmation process has been used in certain cases to weed out mediocre candidates.

While the debate goes on, albeit with less intensity, Supreme Court nominations remain highly political, a fact that is particularly evident when control of the Senate is in a different political party than the presidency. As for the proper role of the Senate, in the words of one of the country's most prominent constitutionalists: "In an appointment to the United States Supreme Court the Senate comes second, but is not secondary. The standards the Senate should apply are the same as those that should govern the President: what would serve the national interest." Louis Henkin, *"Ideology" Is a Central Consideration*, N.Y. Times Sept 11, 1987, at A31, col. 2.

Once on the Court, justices, by and large, have demonstrated great independence from the other branches of government. Moreover, in many cases a justice has disappointed the expectations of the President who nominated him or her. One notorious case is that of Justice William Brennan, nominated in 1956 by President Eisenhower and serving with great distinction until his retirement, in 1990 as the most prominent member of the Court's liberal wing.

B.3. WHO? WHAT? AND WHOM?: STANDING, JUSTICIABILITY AND THE BINDING EFFECT OF CONSTITUTIONAL ADJUDICATION

Constitutions typically allocate rights and duties, and constitutional adjudication is generally meant to be used for vindication of the rights, and enforcement of the duties, involved. Rules concerning *who* has standing to raise

a constitutional claim for adjudication, concerning *what* constitutional claims are justiciable, and concerning *whom* does a constitutional adjudication bind, can shape and constrain the scope of constitutional justice. Thus in many constitutional regimes not everyone can submit constitutional claims for adjudication; not all such claims are justiciable; and not all equally situated citizens may be able to benefit from adjudication in favor of some among them.

B.3.1. STANDING

Rules of standing vary from the extremely restrictive to the virtually unconstrained. Before 1974 only four persons—the President, the Prime Minister, the President of the National Assembly, and the President of the Senate—could challenge the constitutionality of a law voted by the French Parliament before the Constitutional Council. At the other end of the spectrum, in contrast, virtually everyone in the world, even foreigners with no links to the country, can raise a constitutional claim before the Hungarian Constitutional Court (HCC). Moreover, standing is based on status in some countries. For example, in France, groups of sixty or more parliamentarians have standing. In other countries, such as the U.S., standing does not depend on status but on the party who brings a constitutional claim being able to allege an individualized injury caused by the governmental entity being sued. For example, whereas sixty French parliamentarians can challenge a law as unconstitutional on any ground—claiming, for example, that it violates private property rights, see 82–139 DC of 11 Feb. 1982—members of the U.S. Congress have no standing under such circumstances.

Because of the “case-or-controversy” requirement of Article III of the U.S. Constitution party must meet the following requirements articulated by the USSC in order to have standing:

To ensure the proper adversarial presentation * * * a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.

—*Massachusetts v. EPA*, 549 U.S. 497 (2007).

[This case was brought by Massachusetts among other plaintiffs against the federal Environmental Protection Agency (EPA) for failure to regulate the emission of “greenhouse gases” contributing to global warming allegedly in contravention of the U.S. Clean Air Act. According to this Act, the EPA can only refuse to regulate greenhouse gases if it determines that they do not contribute to climate change or offers some reasonable explanation for not undertaking such determination.]

In a 5–4 decision, the USSC held that Massachusetts did meet the standing requirements:

The Injury

The harms associated with climate change are serious and well recognized. Indeed, [a] [r]eport which EPA regards as an “objective and independent assessment of the relevant science,” * * * identifies a number of

environmental changes that have already inflicted significant harms, including “the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years . . .” * * *

That these climate-change risks are “widely shared” does not minimize Massachusetts’ interest in the outcome of this litigation. (“[W]here a harm is concrete, though widely shared, the Court has found ‘injury in fact’”). According to petitioners’ unchallenged affidavits, global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. * * * These rising seas have already begun to swallow Massachusetts’ coastal land. * * * Because the [state] “owns a substantial portion of the state’s coastal property,” * * * it has alleged a particularized injury in its capacity as a landowner.

Causation

EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. At a minimum, therefore, EPA’s refusal to regulate such emissions “contributes” to Massachusetts’ injuries.

EPA nevertheless maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners’ injuries that the agency cannot be haled into federal court to answer for them. For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.

But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. * * * They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed. * * * That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.

The Remedy

While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it. * * * [A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury. * * * Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next

century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere. * * *

—*Id.* at 525–6.

Even when causation is obvious, there are cases where no one has standing to challenge a constitutional violation. A case in point is *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982). Citizens and taxpayers challenged the gift of real estate by the federal government to a private Christian university under the supervision of a religious order as in violation of the “Establishment Clause,” which requires separation between church and state (see Chapter 8) and prohibits government from favoring one religion over others. Although the gift in question clearly appeared in violation of the Constitution, the Court refused to entertain the case, finding that the plaintiffs had not suffered any “injury-in-fact,” no matter how offended they may have been by government subsidy of a religion other than their own.

U.S. standing restrictions may frustrate adjudication of constitutional claims that are in all likelihood valid on the merits. In contrast, in some countries, such as Hungary, there are virtually no standing barriers to the filing of constitutional complaints. In Hungary, any person who claims that the state has violated one or more of his or her rights under the Constitution may file a complaint in the Constitutional Court. Moreover, the procedure for filing such complaints is simple and inexpensive. As a result, the Constitutional Court has been flooded with complaints. A similar trend emerged in Germany and, consequently, the GCC has established a filtering process, leading to summary disposition of 99 percent of such complaints. Does it make any significant difference whether one’s claim is rejected because of standing or summarily disposed of in a screening proceeding?

For a stark contrast with the handling of the standing issue in the above-mentioned countries, consider this decision of the High Court of Tanzania:

* * *

The notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law as distinct from public law. In matters of public interest litigation this Court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter. This position also accords with the decision in *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 46, where it was held by the Supreme Court that the traditional rule of locus standi can be dispensed with and procedure available in public interest litigation can be made use of if the petition is brought to the court by a person acting bona fide.

The relevance of public interest litigation in Tanzania cannot be over-emphasized. Having regard to our socio-economic conditions, this development promises more hope to our people than any other strategy currently in place. First of all, illiteracy is still rampant. We were recently told that Tanzania is second in Africa in wiping out illiteracy but that is statistical juggling which is not reflected on the ground. If we were that literate it would have been unnecessary for Hanang District Council to pass bylaws for compulsory adult education which were recently pub-

lished as Government Notice No. 191 of 1994. By reason of this illiteracy a greater part of the population is unaware of their rights, let alone how the same can be realised. Secondly, Tanzanians are massively poor. Our ranking in the world on the basis of per capita income has persistently been the source of embarrassment. Public interest litigation is a sophisticated mechanism which requires professional handling. By reason of limited resources the vast majority of our people cannot afford to engage lawyers even where they were aware of the infringement of their rights and the perversion of the Constitution. Other factors could be listed but perhaps the most painful of all is that over the years since independence Tanzanians have developed a culture of apathy and silence. This, in large measure, is a product of institutionalized mono-party politics which in its repressive dimension, like detention without trial, sucked up initiative and guts. The people found contentment in being receivers without being seekers. Our leaders very well recognise this, and with the emergence of transparency in governance they have not hesitated to affirm it.

* * *

Given all these and other circumstances, if there should spring up a public-spirited individual [who] seek[s] the Court's intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing.

—*Rev. Christopher Mtikila v. the Attorney General*, Civil Case No. 5 of 1993.

Note on the U.S. Political Question Doctrine and Other Limits on Constitutional Adjudication

In the U.S., there is one important limitation on the justiciability of constitutional claims, namely, that provided by the “political question doctrine.” Although the contours of the doctrine are hardly clear and certain scholars have strongly criticized its coherence—see, e.g., Louis Henkin, *Is There a Political Question Doctrine?*, 85 Yale L. J. 597 (1976)—the political question doctrine has been regularly invoked by courts to refuse adjudicating certain types of constitutional claims. It must be emphasized that the doctrine is not meant to inhibit adjudication of politically charged constitutional issues. For example, the constitutional issues surrounding abortion have been highly politicized for a number of decades in the U.S. (see Chapter 5), but they are justiciable in the same way as all other individual rights issues arising under the Constitution. Instead the “political question doctrine” must be understood in a more technical sense as defined by its many pronged nature. As the Court stated:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility

of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

—*Baker v. Carr*, 369 U.S. 186, 217 (1962).

The first of these prongs, “commitment to a coordinate branch,” stems from a separation of powers concern (see generally Chapter 3) and appears rather straight forward. For example, where the Constitution assigns a matter to another branch of government, such as the executive or the legislative branch, the courts lack justiciability. *See, e.g., Nixon v. United States*, 506 U.S. 224 (1993) (impeachment trial of federal judge entrusted by the Constitution to the Senate and hence whether presentation of evidence to a Senate Committee rather than the full Senate constitutes a “trial” is a nonjusticiable political question). *But see Bush v. Gore*, 531 U.S. 98 (2000), in Chapter 6 (Supreme Court puts an end to disputed Florida presidential election notwithstanding that the Twelfth Amendment of the U.S. Constitution provides for resolution of contested presidential elections in the Congress). For wide-ranging views on *Bush v. Gore* and a comparison of the handling of contested elections in the U.S., France, Germany, Israel, and Italy, see *The Longest Night: Polemics and Perspectives on Election 2000* (Arthur T. Jacobson and Michel Rosenfeld, eds., (2002)).

The last prongs of the “political question doctrine,” dealing with “embarrassment,” “need to adhere to a decision already made,” and “lack of respect to a coordinate branch,” seem to mark the boundary between law and politics but remain particularly nebulous and open-ended. The Court's jurisprudence relating to these prongs, moreover, is far from clear or consistent. *See, e.g., Goldwater v. Carter*, 444 U.S. 996 (1979) (concerning the question of whether the President can abolish a treaty without the participation of the Senate although the latter must ratify treaties by a two-thirds majority, some justices opine that this involves a political question and is hence nonjusticiable, while other justices affirm that the question raises an ordinary constitutional issue that the Court ought to resolve).

Limitations on justiciability can also be used for other purposes besides marking the boundary between the legal and the political. In Spain, for instance, constitutional adjudication does not extend to certain welfare rights. *See* Javier Perez Royo, *Curso De Derecho Constitucional* 363–64 (3d ed. 1996). This limitation allows for drawing a clear line between judicially enforceable constitutional rights and constitutionally grounded goals. Many European courts, however, have power to review even the standing rules and certain procedural decisions of their respective parliaments (see Chapter 3).

In the last analysis, flexible standards regarding standing and justiciability rules seem to enhance the discretion of the constitutional adjudicator. However, limitations on standing and justiciability are but some of the many different factors that influence the scope of judicial review of constitutional claims. Is flexibility preferable? Or is it inherently problematic?

B.3.2. BINDING EFFECTS OF CONSTITUTIONAL ADJUDICATION

As noted in the context of abstract review, the decisions of constitutional courts under the European model are *erga omnes* (binding on everyone), whereas those by the USSC are most certainly binding on the parties to the decided case. Beyond that, however, there is no unanimity. As a practical matter, because of adherence to the doctrine of *stare decisis*, or precedent, prior decisions are dispositive of similar subsequent cases not because the parties to the subsequent case are bound by the prior decision but because the judge in the new case is bound by the *ratio decidendi* of the prior case. Moreover, in the case of the European model the situation is not entirely clear in relation to certain instances involving concrete review.

Another question is, what happens to a law after it has been declared unconstitutional by the constitutional adjudicator? The answer varies from one setting to another, with France and the U.S. occupying opposite ends of the spectrum. In France, where laws can be challenged before the Constitutional Council before they become effective, a law found unconstitutional can never be promulgated, and thus never sees the light of day. In the U.S., in contrast, a USSC decision declaring an existing law unconstitutional results in subsequent nonenforcement of the law but not in its abolition or repeal. If the Court reverses its jurisprudence after a number of years, the invalidated law can be implemented anew without any need for reenactment. Thus, for example, the Court held a minimum-wage law unconstitutional in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), a decision that it overruled in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). In 1937, the Attorney General advised President Roosevelt that the minimum-wage law in question never repealed after 1923 was again applicable. The Attorney General opined that the 1923 decision had simply "suspended" the law, explaining that "the courts have no power to repeal or abolish a statute, and that notwithstanding a decision holding it unconstitutional, a statute continues to remain on the statute book." 39 Ops. Atty. Gen. 22 (1937). Do you agree with the Attorney General, or do you think that democratic lawmaking should require reenactment of a law under such circumstances?

C. CONSTITUTIONAL INTERPRETATION

Constitutional adjudicators can have their greatest impact on shaping a constitutional regime through interpretation of the constitution. Recall, for example, the French Constitutional Council's decision of July 16, 1971 in which, by interpreting the incorporation by reference of the 1789 Declaration of the Rights of Man into the 1958 French Constitution, it arrogated to itself broad powers to invalidate laws infringing on fundamental rights not contemplated by the Constitution's framers. Inasmuch as constitutional texts are often general and open ended, and constitutions may be difficult to amend, the constitutional adjudicator may enjoy great latitude in shaping constitutional law for a long time to come. This power is not easily submitted to democratic control and seems prone to abuse unless the constitutional adjudicator can be subjected to widely accepted interpretive constraints. This section begins with